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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW CHRIS RICHARDS, Defendant and Appellant.	E065398 (Super.Ct.No. FVI021550) OPINION

APPEAL from the Superior Court of San Bernardino County. Colin J. Bilash, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Theodore M. Cropley, and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A defendant bears the burden of proving eligibility for resentencing under section 1170.18.[1] Defendant Matthew Chris Richards argues his offense under Vehicle Code section 10851 falls within Proposition 47 and the value of the property taken was less than $950. Defendant contends the matter should be remanded for a hearing in which defendant may present evidence showing he is eligible for relief. We disagree and affirm the judgment.

II

PROCEDURAL AND FACTUAL BACKGROUND

In 2005, defendant was charged in San Bernardino County case No. FVI021550 with two felonies: unlawful driving or taking of a motor vehicle (a 1990 Honda Accord) (Veh. Code, § 10851, subd. (a)) (count 1), and receiving stolen property (§ 496d, subd. (a)) (count 2). In 2016, defendant pleaded no contest to unlawful taking of a motor vehicle (count 1). The parties stipulated that, if the court were to review police reports, it would find that a factual basis existed for defendant's guilty plea to unlawfully driving a motor vehicle. The reports are not part of the record on appeal. The court sentenced defendant to 16 months in state prison. The sentence was ordered to run concurrent to the sentence in another case, No. FVI019384, in which defendant admitted a violation of

[1] All undesignated references to statutes are to the Penal Code.

probation for possession of a short-barreled shotgun (formerly § 12020, subd. (a), currently § 33210.)

On January 13, 2016, defendant filed a form petition for resentencing pursuant to section 1170.18. Defendant checked the box, alleging he "has completed his/her sentence and petitions to have the felony count(s) designated as a misdemeanor(s)." The prosecutor filed a form response: "Defendant is not entitled to the relief requested" because "VC 10851 is not affected by Prop. 47."

On January 29, 2016, the court heard and summarily denied the petition. The minute order states: "The court finds that Petitioner does not satisfy the criteria in Penal Code [section] 1170.18 and is not eligible for resentencing. Defense petition/Motion for resentencing is DENIED."

III

DISCUSSION

The issue of whether a prior conviction for Vehicle Code section 10851, subdivision (a), qualifies for section 1170.18 relief is a question currently pending before the California Supreme Court.[2] We conclude that section 1170.18 does not apply to Vehicle Code section 10851 and defendant did not establish that the value of the stolen car was under $950.

[2] See, e.g., *People v. Page* (2015), formerly at 241 Cal.App.4th 714, review granted November 24, 2015, S230793; *People v. Haywood* (2015), formerly at 243 Cal.App.4th 515, review granted March 9, 2016, S232250; *People v. Gomez* (2015), formerly at 243 Cal.App.4th 319, review granted April 18, 2016, S233849.

In *People v. Johnston* (2016) 247 Cal.App.4th 252 (review granted July 13, 2016, S235041), the Third District Court of Appeal reasoned that specific exclusion from section 1170.18 of Vehicle Code section 10851 reflected an intentional choice not to afford relief to defendants convicted of that code section. (*Johnston,* at p. 257.) The court explained that "[t]he plain language of section 1170.18 selected only a few provisions of the Health and Safety Code and the Penal Code as offenses to designate as misdemeanors from the multitude of overlapping crimes. This careful parsing of related items invokes one of those Latin phrases that courts love to brandish: *'[E]xpressio unius est exclusio alterius,'* under which the inclusion of only certain items in an associated group gives rise to a strong inference of a deliberate legislative choice to exclude any items not mentioned, absent a compelling indication of legislative intent to the contrary. [Citations.]" (*Ibid.*)

The *Johnston* court held that section 490.2[3] did not affect Vehicle Code section 10851, which is violated either by taking a vehicle or by driving it, regardless of whether there was an intent to steal. (*People v. Johnston, supra,* 247 Cal.App.4th at p. 258.) The court reasoned that section 1170.18 does not apply to car burglary because there, as here, the gravamen of the offense was not a taking but some other proscribed conduct. (*Ibid.*, citing *People v. Acosta* (2015) 242 Cal.App.4th 521, 526.) Vehicle Code section 10851

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[3] Section 490.2 provides, in relevant part, that, "[n]otwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, . . ."

is not listed in section 1170.18. The express inclusion of only particular enumerated offenses implies the drafters intended to exclude nonenumerated offenses, like Vehicle Code section 10851. (Cf. *People v. Guzman* (2005) 35 Cal.4th 577, 588.)

Defendant should likewise be denied relief because Vehicle Code section 10851 is not contemplated by section 490.2 and can be committed without intending a theft. To commit theft, a person must take possession of property owned by someone else, without the owner's consent, with the intent permanently to deprive the owner of the property. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654.) "Taking" is not a synonym for stealing; it is a legal term of art, describing one element of theft by larceny. (*People v. Gomez* (2008) 43 Cal.4th 249, 255.) Taking has two aspects: (1) achieving possession of the property, and (2) carrying the property away. (*Ibid*.) Thus, if a defendant takes property with the intent to deprive the owner of possession temporarily, he has not committed theft. (*People v. Garza* (2005) 35 Cal.4th 866, 871.) Vehicle Code section 10851 may be violated without committing such a theft either by unlawfully driving a vehicle or by taking a vehicle with the intent temporarily to deprive the owner of possession. (*Id.* at p. 876.) Accordingly, section 490.2 is inapplicable. Additionally, defendant failed to allege facts that established his eligibility for relief, and it is the petitioner's burden to establish this threshold element of relief by including facts in his petition that, if true, establish his eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [the petitioner bears the burden of proof to establish facts upon which his eligibility is based]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444,449; *People v. Perkins* (2016) 244 Cal.App.4th 129, 137.) As the petitioning party, defendant was

required to make an initial showing that he met the requirements of section 490.2, under which he was seeking relief, and that he necessarily "would have been guilty of a misdemeanor" under the act. (§ 1170.18, subd. (a).) There was no finding of fact that the value of the car taken was $950 or less, and defendant did not allege the value of the car in his petition for resentencing. There was also no finding of fact that defendant intended to deprive the owner of permanent possession of his or her vehicle, which is a necessary element of theft. (See *Garza,* at p. 871.) Because defendant failed to make an initial showing that his conviction was for a qualifying offense under section 490.2—even assuming the act applies to those convicted under Vehicle Code section 10851—defendant failed to demonstrate he was eligible for relief.

IV

DISPOSITION

The court found section 1170.18 did not apply to defendant's offense. We agree and affirm the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.